

Fordham Urban Law Journal

Volume 34 | Number 4

Article 3

2007

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Recommended Citation

Stephen Loffredo, *Poverty, Inequality, And Class In The Structural Constitutional Law Course*, 34 Fordham Urb. L.J. 1239 (2007).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol34/iss4/3>

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Cover Page Footnote

The author thanks Helen Hershkoff for valuable comments on an earlier draft. Paul Keefe provided able research assistance.

POVERTY, INEQUALITY, AND CLASS IN THE STRUCTURAL CONSTITUTIONAL LAW COURSE

*Stephen Loffredo**

I. INTRODUCTION

Poverty, economic inequality, class, and distributional justice are issues embedded in our constitutional history. They have animated important developments in our constitutional understandings and hold deep, though frequently unacknowledged, significance for constitutional theory and doctrine. Historically, considerations of poverty, inequality, and class played a substantial role in the framing of the 1787 Constitution and the adoption of the Reconstruction Amendments following the Civil War.¹ During the Great Depression and the New Deal, they sparked the constitutional transformation that accompanied the radical re-conceptualization of national power and public responsibility for the material security of citizens;² a generation later, they figured prominently in the “due process revolution” of the 1960s and 1970s.³ Conceptually, the continued existence of an impoverished class of citizens, politically marginalized, physically segregated, and socially isolated, stands in sharp tension with the core principle of equal citizenship and poses a direct challenge to basic assumptions underlying important areas of constitutional theory and doctrine.⁴

The relevance of poverty, economic inequality, and class to a constitutional law course dealing with individual rights ought to be

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1. See, e.g., JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 33-34 (1990); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 38-39 (1990); Pope McCorkle, *The Historian as Intellectual: Charles Beard and the Constitution Reconsidered*, 28 AM. J. LEGAL HIST. 314, 318-319 (1984).

2. See generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* (2004).

3. See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 33-34 (1985) (discussing *Goldberg v. Kelly* as the origin of the “due process revolution”).

4. See, e.g., Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5 (1977) (identifying “equal citizenship,” including the “dignity of full membership in the society,” as a core value of the Fourteenth Amendment).

readily apparent. Due process, equal protection, and the First Amendment—to take three prominent examples—provide fertile ground for exploring the significance of poverty to constitutional theory and doctrine. Less obvious, though, is how and whether these issues might be taught through a constitutional course on structure, separation of powers, and federalism. This Article explores some opportunities for integrating poverty-law issues into a structural constitutional law course and offers an argument for why such integration is desirable. Part II canvasses various understandings of the term “poverty law,” briefly recounts the apparent disappearance of poverty-law issues from the law-school constitutional canon—as well as from the agenda of liberal constitutional theorists—and argues for renewed attention and re-integration. Part III discusses the overarching significance of poverty and economic inequality to constitutional theory and doctrine and recommends specific topics and cases from the standard structural constitutional law curriculum that offer opportunities for raising and developing poverty-law issues. The Article closes with a brief conclusion.

II.

As the Symposium⁵ asks us to address the role of “poverty law” in the law school curriculum, it seems appropriate to reflect for a moment on the provenance and meaning of that term. Though efforts to address the distinct legal needs of poor people date back to the nineteenth century,⁶ it was only in the 1960s that the phrase “poverty law” came into widespread use. The term now carries an array of overlapping meanings. In a fundamental sense, poverty law refers to the new form of legal practice that emerged during the “War on Poverty” of the 1960s,⁷ a form of practice that transcended the traditional legal-aid model of providing individual representation in unconnected and usually private-law matters, and

5. Symposium, *What Is the Place of Poverty Law in the Law School Curriculum?: Looking Back and Planning for the Future*, 34 FORDHAM URB. L.J. 1173 (2007).

6. Starting in the late nineteenth century, legal thinkers, practitioners, and reformers began to analyze the distinct ways in which law affects people living in poverty and urged attention to the imperative of providing reasonably effective access to the justice system for the poor. *See generally* REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW, WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* (2d ed. 1919).

7. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 270-72 (Vintage Books 1979) (describing the “war on poverty” declared by Lyndon Johnson and the legislative program enacted to carry it out).

instead sought to enlist the law in a systemic effort to achieve social and structural changes that might alleviate poverty itself.⁸ In a related sense, poverty law might be understood as a reference to the substantive areas in which lawyers for the poor have carried on this new kind of practice, areas as diverse as welfare law, family law, housing law, consumer law, employment law, and education law⁹—frequently intermixed with innovative theories of constitutional law and administrative law—and the distinctive approaches to those areas dictated by the needs and goals of economically distressed communities and individuals.¹⁰ As a form of practice with transformative aspirations, poverty law might also be taken to mean one or more of the alternative models of lawyering pursued by some poverty lawyers that generally reject the hierarchies of the conventional lawyer-client relationship, favor work in alliance with social change movements, community organizations, and client groups, and envision a more facilitative and collaborative role for the attorney.¹¹ From a more academic standpoint, poverty law might be understood as encompassing the study of the underlying

8. See, e.g., E. Clinton Bamberger, Jr., *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME LAW. 847, 852 (1966) (statement by Clinton Bamberger—first director of the Office of Economic Opportunity (“OEO”) Office of Legal Services—that legal services attorneys should marshal “the forces of law and the power of lawyers in the War on Poverty to defeat the causes and effects of poverty”); see also Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1401-03 (1995) (reviewing MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993)).

9. More recently poverty lawyers have helped spearhead the “community-based economic development” movement. See generally Brian Glick with Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 107-08 (1997). Immigration law also became a staple of poverty law practice, though congressional restrictions on the Legal Services Corporation in mid-1990s curtailed this work for programs receiving federal funds. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321.

10. Some of the first law school textbooks on poverty law reflect these understandings of the term. See ARTHUR L. BERNEY ET AL., *LEGAL PROBLEMS OF THE POOR: CASES AND MATERIALS* 2-3 (1975); GEORGE COOPER ET AL., *CASES AND MATERIALS ON LAW AND POVERTY* ch. 1-5 (2d ed. 1973) (income maintenance, family law and poverty, housing, racial discrimination in employment, consumer protection); ARTHUR B. LAFRANCE ET AL., *LAW AND THE POOR* xvii-xix (1973) (consumer law, welfare, housing, and litigation). For an early and classic example of scholarship examining the distinctive impact of law on poor communities, see Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part I)*, 16 STAN. L. REV. 257, 258 (1964).

11. See Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173, 178-82 (2001) (discussing new forms of poverty law practice).

theories, structures, and evolution of social welfare programs and policies in the United States, an assessment of the extent to which these governmental interventions have functioned as vehicles of progress or as instruments of subordination and control, and an evaluation of the politics of poverty and welfare.¹² More generally, poverty law might include a critical analysis of how the law maintains institutions and practices that create and perpetuate severe inequalities of wealth and economic opportunity and facilitates the translation of those inequalities into a system of unequal political power, privilege, and citizenship.¹³

Regardless of how one defines poverty law, I suspect that most law students hear virtually nothing in their basic constitutional law classes about the subject; or about poor people, burgeoning economic inequality, plummeting mobility, the persistence of hunger and homelessness in the United States, class-based distribution of privilege and power, the political and social marginalization of people living in poverty, state responsibility regarding any of these phenomena, or the constitutional significance of a legal and political system that perpetuates this order of things. Not long ago, poverty law issues held a vibrant, if not central, place in many constitutional law classes,¹⁴ and even elite law journals routinely featured articles examining the constitutional dimensions of wealth, poverty, and class.¹⁵ Yet for all appearances these issues

12. See generally MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 2, 29-31 (1993); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994).

13. See, e.g., Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 331 n.8 (2006) (listing poverty law as one of the approaches for analyzing law and economic inequality); see also Karen L. Tokarz, *Poverty, Justice, and Community Lawyering: Interdisciplinary and Clinical Perspectives*, 20 *WASH. U. J.L. & POL'Y* 1, 10 (2006) (discussing William Quigley's argument that most lawyers work to preserve the wealth and privilege of those in power by upholding an unjust legal framework, and calling for a new approach to addressing poverty).

14. See generally LAFRANCE ET AL., *supra* note 10, at xvii (discussing the emergence of poverty law issues in various parts of law school curricula, and noting that "[e]ven basic subjects, such as property and constitutional law, have begun to reflect developments concerning the law of the poor").

15. See generally Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 *COLUM. L. REV.* 1103 (1986); Robert H. Bork, *Commentary, The Impossibility of Finding Welfare Rights in the Constitution*, 1979 *WASH. U. L.Q.* 695; Karst, *supra* note 4, at 1; Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 *WASH. U. L.Q.* 659; Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964); Charles A. Reich, *Toward the*

have faded from the constitutional law curriculum and from active scholarly review. It seems that each year the major constitutional law casebooks devote fewer pages and less attention to the constitutional status of poverty and economic inequality.¹⁶

At the same time, liberal constitutional theorists have largely abandoned the poor. The majority view among these liberal scholars now appears to be that poverty and class inequality—and their direct and collateral impacts—lie beyond the Constitution’s cognizance or concern.¹⁷ Many liberal scholars have not simply renounced constitutional welfare rights as being “off-the-table” and “off-the-wall” (and therefore not worthy of scholarly attention or inclusion in a progressive “constitution in exile”),¹⁸ but level the potentially more sweeping claim that “‘our constitutional tradition’ is indifferent to ‘economic inequality.’”¹⁹ Others, while acknowledging the constitutional peril in permitting desperate poverty among citizens of a “deliberative democracy,” nevertheless display a puzzling resistance to any suggestion that the courts ought to afford some meaningful protection to the economically afflicted,²⁰

Humanistic Study of Law, 74 YALE L.J. 1402, 1407 (1965); Mark Tushnet, “. . . And Only Wealth Will Buy You Justice”—Some Notes on the Supreme Court. 1972 Term, 1974 WIS. L. REV. 177; Ralph K. Winter, Jr., *Poverty, Economic Equality and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

16. See, e.g., WILLIAM COHEN ET AL., CONSTITUTIONAL LAW 935-36 (12th ed. 2005) (less than one page discussion of wealth classifications and equal protection); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 824-25 (15th ed. 2004) (one and one-half page discussion). For a notable exception to this trend, see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS ch. 9, pp. 1593-1800 (5th ed. 2006) (full chapter devoted to “The Constitution in the Welfare State”).

17. See William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1, 3 (1999) (recounting and critiquing the majority liberal view that “the Constitution’s promise of equal citizenship addresses racial and caste inequalities but leaves class inequalities alone,” and the more general view that class inequalities fall outside the scope of constitutional concerns).

18. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1732-33 (1997); see also CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 8 (1993) (rejecting the idea that the Constitution creates any judicially enforceable right to minimum subsistence).

19. William E. Forbath, *The Constitution and the Obligation of Government to Secure the Material Preconditions for a Good Society: Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1825 (2001) (quoting Lawrence Lessig, *Colloquy, Fidelity as Translation*, 65 FORDHAM L. REV. 1507, 1510 (1997)).

20. See Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 731 (1997) (discussing the poor as dispensable for liberal professors attempting to establish more moderate credentials in a rightward trending political environment); Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1074-75 (1993) (observing that liberal

but optimistically suggest that the political branches ought to be bound by constitutional norms that protect the poor.²¹ Still others contribute to the trend through silence and neglect, that is, through institutional scholarship that tacitly denies the impact of poverty, inequality, and class on our political processes, our social relations, and on the possibility of maintaining even a pretense of equal citizenship or equality before the law.²²

What accounts for these developments? Poverty and economic inequality—as social ills, as markers of political and democratic failure, and as human affliction—are issues as grave and pressing now as at any time in the last thirty years. The United States continues to allow thirty-seven million of its people to subsist below the federal poverty line—a standard at which even minimally decent living conditions are impossible to attain in most parts of the nation.²³ Ten years after federal “welfare reform” legislation ended the Aid to Families With Dependent Children (“AFDC”) pro-

constitutional theorists had abandoned a traditionally ‘left’ position, “the reduction of severe disparities in material well-being”).

21. See, e.g., SUNSTEIN, *supra* note 18, at 135-39.

22. See Gene Nichol, *Law's Disengaged Left*, 50 J. LEGAL EDUC. 547, 553 (2000). Fortunately, some prominent voices have continued to draw attention to the constitutional dimensions of poverty. See generally CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED (Grosset/Putnam 1997); Kenneth L. Karst, *Poverty and Rights: A Pre-Millennial Triptych*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399 (2002); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004). Cf. Martha R. Mahoney, *Class and Status in American Law: Race, Interest and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 800 (2003) (noting a renewed scholarly interest in issues of class, though not necessarily among constitutional scholars).

23. The federal poverty line as a measure of poverty in the United States substantially understates the magnitude of the problem. See, e.g., JOSEPH DALAKER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORT: ALTERNATIVE POVERTY ESTIMATES IN THE UNITED STATES: 2003, at 16 (2005), available at <http://www.census.gov/prod/2005pubs/p60-227.pdf> (“While the thresholds represent one measure of families’ needs, the official poverty measure should be interpreted as a statistical yardstick rather than as the only description of what people and families need to live.”). In New York City, this poverty measure—\$17,170 for a family of three—understates cost of sustaining minimally decent housing, food, and basic necessities by a factor of almost three. Compare Office of the Sec’y, Dep’t of Health and Human Serv., Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147 (Jan. 24, 2007) (reporting the 2007 Poverty Guideline for three person families living in the forty-eight contiguous states and the District of Columbia as \$17,170), with WOMEN’S CTR. FOR EDUC. & CAREER ADVANCEMENT, THE SELF-SUFFICIENCY STANDARD FOR THE CITY OF NEW YORK 2004, at 3, available at http://www.wceca.org/publications/NYC_Standard.pdf (reporting the 2004 Self-Sufficiency standard for families of one adult, one preschooler, and one school-age child as \$49,874 in the Bronx and \$51,567 in Brooklyn).

gram, the number of children submerged in deep poverty (i.e. living below fifty percent of the poverty line) has substantially increased;²⁴ thirty-eight million people live in households without adequate food; 3.5 million go homeless.²⁵ Hard work and “playing by the rules” still do not guarantee relief from these conditions; full-time employment at the minimum wage leaves a family of three well below the poverty line, low-wage workers are worse off now than a generation ago, and the decline in economic mobility keeps an ever greater portion of them chained to the bottom rungs of the economic ladder.²⁶ The United States is the wealthiest and most powerful nation in human history, yet we lead the industrialized world in poverty rate, in child impoverishment, in low birth weight, and in infant mortality.²⁷ Poverty in America has not faded as a national tragedy of the first order even if, in some quarters, attention to it has.

Nor has the conceptual link between poverty law and constitutional law weakened over the last decades. To the contrary, ever-widening disparities of wealth and income in the United States,²⁸ coupled with alarming declines in economic mobility and troubling signs of political and social ostracism of poor people,²⁹ have intensified the constitutional significance of poverty and class. The class structure in the United States is now more polarized and entrenched than at any time since the years preceding the Great Depression.³⁰ Economic inequality has grown to levels unprece-

24. SHARON PARROTT & ARLOC SHERMAN, CTR. ON BUDGET AND POLICY PRIORITIES, TANF AT 10: PROGRAM RESULTS ARE MORE MIXED THAN OFTEN UNDERSTOOD 4 (2006), *available at* <http://www.cbpp.org/8-17-06tanf.pdf>. Only thirty-one percent of poor children now receive federal assistance, down from sixty-two percent before welfare reform. *Id.* at 5.

25. Nat'l Coal. for the Homeless, *How Many People Experience Homelessness?*, NCH FACT SHEET #2, June 2006, at 2, *available at* http://www.nationalhomeless.org/publications/facts/How_Many.pdf.

26. See LAWRENCE MISEL ET AL., THE STATE OF WORKING AMERICA 2002/2003, at 418-19 (2003).

27. INNOCENTI RESEARCH CENTRE, UNICEF, CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES, REPORT CARD 7, at 5 (2007).

28. See Richard L. Kaplan, *Economic Inequality and the Role of Law*, 101 MICH. L. REV. 1987, 1988 (2003) (reviewing empirical data on widening economic inequality in the United States).

29. See HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY 2-8 (1995).

30. See Christopher Jencks, *Our Unequal Democracy*, AM. PROSPECT, June 7, 2004, at A2-A4, *available at* <http://theamericanprospect.com/web/printfriendly-view.wv?id=7748> (observing that the United States has not experienced current levels of income and wealth inequality since the period between 1913 and 1929).

dented in modern times, while the possibility of escaping the lowest economic strata continues to fall.³¹ At the very least, it is no longer plausible to suggest, as the Supreme Court did thirty years ago, that poor people are too fluid and indistinct a group to be worthy of constitutional attention or concern.³²

Furthermore, the social and spatial segregation of the poor has intensified together with the general level of antipathy expressed towards people living in poverty. The political discourse on poverty and welfare—nearly always a losing proposition for those trapped at the bottom—turned especially ugly in the years culminating in the 1996 federal “welfare reform” legislation.³³ As sociologist Herbert Gans wrote, by the 1990s the war on poverty had devolved into a war on the poor, rife with scapegoating, dehumanizing rhetoric, and racially charged stereotyping that blamed destitute women and children not only for their own plight, but for economic stagnation, crime, and an array of other societal ills.³⁴

31. See ANNETTE BERNHARDT ET AL., DIVERGENT PATHS: ECONOMIC MOBILITY IN THE NEW AMERICAN LABOR MARKET 110-49 (2001) (documenting a “marked deterioration in upward mobility,” that, the authors conclude, “threatens the meaning of prosperity in postindustrial America”); MISHLE ET AL., *supra* note 26, at 418-19 (documenting an “exceptionally low” exit rate from poverty in the United States); see also Paul E. Gabriel, *An Examination of Occupational Mobility Among Full-time Workers*, MONTHLY LAB. REV., Sept. 2003, at 32-36, available at <http://www.bls.gov/opub/mlr/2003/09/art2full.pdf> (finding hardening of occupational structure throughout the 1990s with decreases in both upward mobility for low-income workers and downward mobility for high-wage occupations); Daniel P. McMurrer & Isabel V. Sawhill, Urban Inst., *Economic Mobility in the United States* (Oct. 1, 1996), available at <http://www.urban.org/url.cfm?ID=406722> (analyzing existing research and noting that low-income households consistently have the lowest rate of economic mobility).

32. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973) (noting that “the class of disadvantaged ‘poor’ cannot be identified or defined in customary equal protection terms”); *James v. Valtierra*, 402 U.S. 137, 142 (1971) (implicitly characterizing the poor as merely one of many “diverse and shifting groups”).

33. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

34. See GANS, *supra* note 29, at 557-59; see also Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 475 (1997) (“On the floor of the United States Congress, Representatives characterize welfare recipients as alligators and wolves, made dependent by being fed. Many state officials also subscribe to this view. According to Don Boys, a former member of the Indiana House of Representatives, ‘many Welfare Mamas are, as the old-timers used to say, very “fleshy,” sucking on cigarettes, with booze and soft drinks in the fridge, feeding their faces with fudge as they watch the color TV.’”); Lucy A. Williams, *Race, Rat Bites, and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1184 (1995) (“Attacks on welfare almost invariably concentrate on the symptoms of family desertion, neglected children, and illegitimacy. Such a welfare recipient becomes ipso facto immoral and unsuitable in the minds of most people, regardless of the rights of the needy child to receive legal assistance and protection.”).

This socially constructed otherness of the poor is reinforced by (or perhaps serves as justification for) the social and spatial isolation of low-income families in economically segregated neighborhoods and inferior public schools.³⁵ Some commentators detect caste elements in our treatment of poor people and suggest that we have constructed and maintain a system approaching economic apartheid.³⁶ One cannot easily dismiss such characterizations, especially following the government's appalling treatment of the desperate families abandoned in New Orleans after Hurricane Katrina.³⁷ In any event, the persistence of debilitating poverty suffered by millions of the nation's people who are disproportionately minority and female, the social and geographic isolation of the group, and the general antipathy towards and effective exclusion of its members from the processes of self-government represent constitutionally significant markers of subordination and second-class citizenship, implicating core constitutional values and assumptions.³⁸

Although poverty and economic inequality continue to be salient national issues with distinct constitutional dimensions, explanations for the declining presence of poverty-law issues in constitutional scholarship and teaching are not hard to conjure. Perhaps the primary factor is the sense that the Supreme Court in the early 1970s settled the "big issues" at the intersection of constitutional law and poverty law (i.e., whether a right to subsistence inheres in the Constitution and whether wealth constitutes a suspect or quasi-suspect classification)³⁹ and that the prospects for doctrinal movement are

35. See PAUL JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS AND THE AMERICAN CITY* 117-42 (1997) (documenting increased economic segregation in the United States); see also KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 125-26 (1991) (arguing that perception of poor people as "the Other" drives public policies aimed at "separating the poor—especially the female and minority poor—from the rest of us").

36. See KARST, *supra* note 35, at 125-26; see also CHUCK COLLINS & FELICE YESKEL, *ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY AND INSECURITY* 43 (2005).

37. See generally THERE IS NO SUCH THING AS A NATURAL DISASTER: RACE, CLASS, AND HURRICANE KATRINA (Chester Hartman & Gregory D. Squires eds., 2006); see also generally Cheryl I. Harris, *Whitewashing Race, Scapegoating Culture*, 94 CAL. L. REV. 907, 935 (2006).

38. See Kenneth L. Karst, *Citizenship, Race and Marginality*, 30 WM. & MARY L. REV. 1, 1-3 (1988).

39. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (finding no constitutional right to subsistence); *James v. Valtierra*, 402 U.S. 137, 141 (1971) (declining to apply heightened scrutiny to an apparent wealth classification); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (same); see also *Maher v. Roe*, 432 U.S. 464,

remote given the conservative judicial climate. Of course, doctrinal stability is not in itself sufficient reason for halting scholarly inquiry and critique, as the work of constitutional conservatives through the 1970s and 1980s and their elaboration of a “constitution-in-exile” ultimately illustrated.⁴⁰ The difference may be in the perception that constitutional scholarship addressing poverty and class is no longer taken seriously, is not quite respectable, or is easily dismissed as “advocacy scholarship,” and that the path to success in academia and beyond lies elsewhere. On the other hand, at least some constitutional scholars have criticized the waning academic attention to the constitutional implications of wealth, poverty, and class.⁴¹

Whatever one concludes about the content and direction of constitutional scholarship, the argument for addressing issues of economic inequality, poverty, and class in the constitutional curriculum seems unanswerable. Law schools have an obligation to train their students not only as technical practitioners but also as “lawyer-citizens,” many of whom will assume positions of public power and responsibility. A natural and indispensable venue for this broader training is the constitutional law course. As Jack Balkin and Sanford Levinson have argued, teachers designing a constitutional law course should bear in mind that “lawyers perform a special ‘citizenship’ role in a democracy” requiring that they understand not only the fundamental workings and history of the American legal system, but also its shortcomings, so that they may “participate in and contribute to . . . discussions about . . . whether America is in fact well served by particular aspects of its law and whether certain radical changes might not be desirable.”⁴² Balkin

471 (1977) (“This Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”).

40. See Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 70-71 (2003) (arguing that the present political system leaves little “room for creative advocacy directed at the courts by the liberal side,” but that “liberal” scholarship “pushing the envelope” may be valuable on the model of “conservative scholarship of the 1970s and 1980s” which, though considered “crazy” or “utopian” at the time and “having only the most remote connection to what seemed possible within the political and legal system as then contoured” later provided the blueprints for doctrinal change).

41. See Tushnet, *supra* note 40, at 70-71; Graber, *supra* note 20, at 813-18; Nichol, *supra* note 22, at 547-48.

42. J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 977-78 (1998); see also *id.* at 1004 (“[M]any law professors believe that it is their function to train lawyer-citizens as well as legal practitioners, especially because the United States continues to draw an excessive number of its leaders from the ranks of professionally trained lawyers. . . . Trained in law schools to

and Levinson note, correctly I think, that constitutional law courses are uniquely situated to serve this function and that the standard curriculum reflects a general orientation in that direction.⁴³ The principal justification for the basic constitutional law course cannot be the preparation of students to litigate open constitutional questions, since most of the curriculum addresses decidedly settled questions and most students will never litigate a constitutional issue. Rather, the central goal must be an education in our constitutional system, its history, structure, and evolution and how it generates, interacts with, and responds to the challenges facing the country.

By this metric, poverty-law issues—including the treatment of poverty as a constitutional category, state responsibility for the distribution of wealth, opportunity, and power, state obligation to see to the material well-being of its citizens, and the impacts of poverty and radical economic inequality on our social structures, legal system, and political processes—all deserve a place in the constitutional law curriculum. These issues embody some of the most pressing social, political, and moral questions of our time and sharply pose the question of whether settled constitutional doctrines have served the nation and its underlying constitutional values well. In addition, attending to questions of poverty and economic inequality in a course on constitutional law in particular highlights the gravity of those issues, illuminates the role of law and legal institutions in creating or alleviating economic injustice and distress, and may even reinforce the idea that the legal profession bears an obligation to counteract the translation of economic inequality into inequality of citizenship and inequality before the law.⁴⁴

III.

This Part outlines some approaches for integrating issues of poverty, class, and economic inequality into the introductory course on

have entirely too much faith in the Constitution and never having considered some of its manifest imperfections—indeed, outright stupidities—our students will have few tools with which to think about the adequacy of the institutions bequeathed to us by our long-dead founders.”).

43. *Id.* at 964.

44. Given the “hegemony of constitutional law” in the minds of students and legal academics, *id.* at 993, the inclusion or exclusion of poverty law issues from the constitutional curriculum likely communicates a judgment about the importance of those matters.

constitutional structure, federalism, and separation of powers.⁴⁵ On the broadest level, it is almost always possible and instructive to examine whether the assumptions underlying constitutional theory and doctrine adequately account for the social and political impacts of poverty and economic inequality. For example, a prominent paradigm of modern constitutional theory, the “process-based” or “representation reinforcement” approach to constitutional interpretation and adjudication, is especially susceptible to this type of analysis because it rests on an account of American politics that ignores the overwhelming influence of unequal wealth.⁴⁶ Likewise, the central *critique* of judicial review—as deviation from democratic norm—suffers from a similar vulnerability because it is insensitive to whether the political processes displaced by particular exercises of judicial authority actually embody democratic practice.⁴⁷ Since both the justification and the critique of judicial review typically arise throughout the course, they provide multiple opportunities to explore the constitutional significance of economic inequality, poverty, and class. A second set of opportunities to integrate poverty-law issues into a course on constitutional structures arises from the role that wealth, class, poverty, and social-welfare policy have played in constitutional history and doctrinal evolution. A third set of opportunities may be grouped around the theme of the courts’ failure to understand or empathize with those living at the economic margin, and the impact that this judicial aloofness has had on the elaboration and application of constitutional law. I will address a few of these opportunities in the order that they conventionally appear in the standard constitutional law course—the history of the founding; theories of constitutional interpretation; and the structural doctrines themselves—with the caveat that these few examples by no means exhaust the possibilities.

45. Still other opportunities exist in those courses that emphasize individual rights, rather than institutional arrangements.

46. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1981) for the classic exposition of the “process-based” or “representation reinforcement” theory of constitutional judicial review. For critiques of the theory as paying insufficient attention to matters of economic and class inequality, see, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 737-40 (1985); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1331-50 (1993) [hereinafter Loffredo, *Poverty, Democracy and Constitutional Law*]. For a general critique of process-based approaches, see, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980).

47. See Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 69-71 (1986).

A. Backgrounds: Wealth Disparities and the Founding of the U.S. Constitution

The Founding period presents a broad array of complex issues,⁴⁸ one of which is the role that economic inequality and redistributive activities by the states played in the design and adoption of the Constitution.⁴⁹ Federalists and anti-Federalists, though at odds on the great sweep of issues, both recognized the inherent tension, perhaps even contradiction, between a system of self-government and the maintenance of substantial disparities of wealth amongst the citizenry.⁵⁰ For the Federalists, too much democracy, or popular control of government, threatened the privileged position of the propertied classes; to the anti-Federalists, economic inequality threatened the possibility of a truly self-governing republic.⁵¹ They were, of course, both right.

Many of the framers, Madison among them, feared that “pure democracy”—often derided as “mob rule”—would permit majorities of common people to vote themselves economic equality.⁵² Viewed through the lens of our history of money-dominated politics, students may regard this fear as quaint and ironic. But the concern was real, as Madison’s blunt statement in the closed debates at the constitutional convention make clear: “In future times a great majority of the people will not only be without landed, but any other sort of property. These [may] combine under the influence of their common situation; in which case the rights of property . . . will not be secure in their hands.”⁵³ Madison and his colleagues perhaps had good reason to fear for the primacy of property rights in the post-Revolutionary period. Several state legislatures—in tune with the strong egalitarian strain in American thought at that time⁵⁴—had enacted debt-relief provisions and measures to redis-

48. See Thurgood Marshall, *The Constitution’s Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

49. See Mark V. Tushnet, *The Constitution as Economic Document: Beard Revisited*, 56 GEO. WASH. L. REV. 106, 106-07 (1987).

50. See, e.g., Loffredo, *Poverty, Democracy and Constitutional Law*, *supra* note 46, at 1280-81.

51. *Id.*

52. See, e.g., ANDREW HACKER, CONGRESSIONAL DISTRICTING 7-8 (1963).

53. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1789, at 203-04 (Max Farrand ed., 1966).

54. See, e.g., GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 229-243 (1991); see also *id.* at 232 (“Equality was . . . the most radical and most powerful ideological force let loose in the Revolution.”).

tribute wealth.⁵⁵ Shay's Rebellion in Massachusetts stood as a sign—ominous to the framers—of insistent economic egalitarianism among the populace.

Madison amplified his analysis in THE FEDERALIST NO. 10, one of the most renowned of the founding documents and widely regarded as a key source of the political theory underpinning the Constitution. It is here that Madison identified the principal threat in any scheme of self-governance as the danger of "factions"—groups that would use public power to advance their own interests at the expense of the common good.⁵⁶ The greatest cause of factions, Madison asserted, is disparities in wealth; such disparities cause society to fracture into opposed groups, between which clashes of interest are inevitable.⁵⁷ In essence, Madison set out a rudimentary theory of class conflict some seventy years before Marx, though of course his prescription is quite different.⁵⁸ For Madison, the first object of government was the protection of property rights, the implication being that such rights, and the unequal distribution of wealth that they produced and maintained, must prevail over public values and interests designated through legislative processes.⁵⁹ Lest any doubt remain on that point, FEDERALIST No. 10 concluded by decrying redistributive legislation in the states as "improper and wicked," citing especially "[a] rage for paper money, for an abolition of debts" and "for an equal distribution of property."⁶⁰

To the anti-Federalist opponents of the Constitution, the State had every right, and perhaps even an obligation, to counteract large disparities of wealth.⁶¹ Such divisions among citizens were regarded as inimical to republican ideals of shared interest, civic

55. See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 18-21 (2d ed. 2005) (describing redistributive legislation in the states during the post-revolutionary period and other "excesses of democracy"); NEDELSKY, *supra* note 1, at 147-49.

56. THE FEDERALIST NO. 10, at 57-59 (James Madison) (Jacob E. Cooke ed., 1961).

57. *Id.* at 59 ("[T]he most common and durable source of factions has been the various and unequal distribution of property.").

58. Cf. MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 55 (1987) (discussing the claim that Madison's analysis in THE FEDERALIST NO. 10 "anticipated a philosophy of history that is usually associated with the name of Karl Marx").

59. THE FEDERALIST NO. 10 (James Madison), *supra* note 56, at 57-59.

60. *Id.* at 65.

61. See Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1552-53 (1988).

virtue, and enlightened self-governance.⁶² Moreover, unchecked maldistribution of property might deprive those at the bottom of the material security thought essential to the function of a citizen.⁶³ Later in life Madison altered his thinking and came to believe, with Jefferson and others, that large disparities of wealth were harmful to a republican system of government and ultimately not in the nation's interests.⁶⁴ Jefferson suggested that the economic security of all citizens was essential to the maintenance of democratic institutions, and the government should ensure this level of security.⁶⁵

These strains in the founding illustrate that questions of economic inequality, distributive justice, political incapacity of the poor, and governmental authority to redress untoward divisions of wealth have been entwined with constitutional law since the beginning, a point worth making in light of the Court's frequent failures to account for wealth disparity and class difference in the elaboration and application of constitutional doctrine.

These issues re-emerged most clearly a century and a half later with challenges to the Social Security Act and other New Deal legislation as improper redistributive measures that lay beyond the government's constitutional authority,⁶⁶ with President Roosevelt's proposal of "a second Bill of Rights" guaranteeing economic security to every citizen,⁶⁷ and with the constitutional transformations

62. See, e.g., 2 *THE COMPLETE ANTI-FEDERALIST* 139 (Herbert J. Storing ed., 1981) ("A republican or free government can only exist . . . where property is pretty evenly divided.").

63. See WOOD, *supra* note 54, at 234. Interestingly, ensuring such security would have answered one of Madison's concerns—that economically insecure voters would be easily swayed—or bought.

64. See James Madison, *Parties*, NAT'L GAZETTE, Jan. 23, 1792, in 14 *PAPERS OF MADISON* 197 (Robert A. Rutland et al. eds., 1975) (stating that government should employ "the silent operation of the laws which, without violating the rights of property, reduce extreme wealth to a state of mediocrity and raise extreme indigence to a state of comfort"); see also SUNSTEIN, *supra* note 18, at 138-39.

65. See WOOD, *supra* note 54, at 178-79 (recounting Jefferson's proposal that the new state of Virginia grant fifty acres of land to each man who did not possess as much in order that all could effectively discharge the responsibilities of citizens in a republic).

66. See, e.g., *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (upholding old-age pension provisions of the Social Security Act as permissible taxing and spending for the general welfare); see also *Steward Mach. Co. v. Davis*, 301 U.S. 548, 578-83 (1937) (upholding unemployment insurance provisions of the Social Security Act as permissible taxing and spending for the general welfare).

67. Franklin Delano Roosevelt, U.S. President, State of the Union Address (Jan. 11, 1944), available at <http://teachingamericanhistory.org/library/index.asp?document=463>; see William E. Forbath, *The New Deal Constitution in Exile*, 51 *DUKE L.J.* 165, 176-84 (2001) (recounting arguments of President Franklin Roosevelt and other New Deal proponents that "citizens had fundamental economic and social rights under the

that accompanied the New Deal.⁶⁸ Additionally, the idea—current at the founding—that true self-governance presupposes the basic material security of each citizen⁶⁹ continued to echo two centuries later in *Goldberg v. Kelly*,⁷⁰ where Justice Brennan reasoned that government had an important interest in ensuring the economic security of our poorest citizens, not only to guard against social unrest, but also as a means of enabling all to participate as equals in the democratic community contemplated by the Constitution.⁷¹

B. Constitutional Theories: Wealth Disparity, Judicial Legitimacy, and Interpretive Practices

At least since *Marbury v. Madison*,⁷² and unquestionably before as well, commentators, politicians, courts, and the people themselves have debated the legitimacy of constitutional judicial review. The classic critique holds that the practice offends basic principles of democratic governance. Alexander Bickel coined the term “counter-majoritarian difficulty” to describe this perceived tension between a power in unelected judges to negate duly enacted laws and a constitutional system grounded in democratic principle and majoritarian rule.⁷³ A common question in constitutional law casebooks asks students to consider whether Alexander Hamilton’s formalist defense of the judicial power in THE FEDERALIST NO. 78 persuasively answers the counter-majoritarian critique.⁷⁴ Hamilton there argues that the institution of judicial review is not counter-majoritarian at all, but necessary to ensure that transient legislative majorities do not override the values that a supermajority of the

Constitution” and that Congress had not only the constitutional authority, but also a “duty to exercise its power to govern economic and social life in a way that sought to secure those rights”).

68. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 423-26 (1987) (describing the reformulation of the constitutional framework during the New Deal period).

69. The idea traces back to the ancients. See, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 333 (1989).

70. 397 U.S. 254 (1970).

71. *Id.* at 265 (“Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity.”).

72. 5 U.S. 137 (1803).

73. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1st ed. 1962).

74. See, e.g., GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 42-45, 49-50 (5th ed. 2005).

people enshrined in the Constitution.⁷⁵ While Hamilton's argument might hold a neat logical appeal for some, it also strikes many students as entirely too formal and reductionist.⁷⁶

Integrating issues of class and poverty law into this discussion of constitutional theory and the legitimacy of judicial review provides an opportunity for students to consider the real-world assumptions underlying the counter-majoritarian critique. One such assumption is that the political processes displaced by judicial review are actually fair and democratic in operation.⁷⁷ Even Robert Bork has recognized that "[t]he democratic integrity of law . . . depends entirely upon the degree to which its processes are legitimate."⁷⁸ The assumption of legitimacy invites further discussion of what counts as a legitimate political process in a democratic regime—and here issues of class-based distribution of political power loom large.⁷⁹

Once down this road, students might be asked to consider whether the counter-majoritarian critique operates in the same way when litigants without access to economic power, and therefore little access to the political process, seek assistance from the courts. If people living in poverty lack a democratically fair share of political access—if the ordinary channels of civic and political engagement are not open to them, so that courts are the only meaningful avenue or effective point of access—then perhaps the availability of judicial redress and the institution of judicial review in those cases does not deviate from democratic practice at all,⁸⁰ but serves as a corrective that enhances democracy.⁸¹ In a related

75. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 56, at 525 (arguing that the power of judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people [as declared in the Constitution] is superior to both").

76. Students are usually quick to conclude that Hamilton's argument—like Chief Justice Marshall's in *Marbury* itself—elides the question of textual ambiguity and vastly understates the power judges exercise in interpreting the Constitution. Few, if any, students are convinced by the formal claim that judges striking down democratically enacted legislation are simply enforcing clear directives of "the People."

77. See Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 247-48 (1981).

78. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 2 (1990); see also Balkin & Levinson, *supra* note 42, at 1022-23 ("If we paid more attention to the empirical realities of American politics—an attention that is rare in any constitutional law casebook—we might have a very different view of the so-called 'countermajoritarian difficulty' as the central theoretical issue of constitutional law.").

79. See Loffredo, *Poverty, Democracy and Constitutional Law*, *supra* note 46, at 1278-90.

80. See Parker, *supra* note 77, at 248-51 (suggesting that there is no democratic norm in American politics from which to deviate).

81. See, e.g., Michelman, *supra* note 47, at 55.

context, the Supreme Court itself has recognized that litigation may operate as an alternative to blocked or inaccessible political processes, noting that “under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”⁸²

C. Supreme Court Appellate Authority and State Court Judgments

At least since *Brown v. Board of Education*,⁸³ the Supreme Court has occupied a prominent, if uneven, role as protector of individual rights and racial equality. Although many commentators question the strength of the Court’s commitment to constitutional norms that run contrary to popular opinion,⁸⁴ no one doubts the important structural role that appellate jurisdiction over state court judgments has played in constitutional development. Perhaps less obviously, the *limitations* on that jurisdiction afford a key doctrinal opportunity to explore complex questions of federalism and social rights that invert the conventional story in which state sovereignty acts as a foil to progressive rights. In particular, study of these limits on federal judicial power provides an opening to remind students of state constitutional jurisprudence and the alternative space that that jurisprudence creates on issues affecting poor people.

Many basic constitutional law casebooks focus on Justice Story’s decision in *Martin v. Hunter’s Lessee*,⁸⁵ which established the Supreme Court’s authority to exercise appellate jurisdiction over state court judgments on questions of federal law. The Supreme Court later developed a corollary doctrine—the doctrine of adequate and independent state grounds⁸⁶—that limits this appellate authority.⁸⁷ For reasons of comity and federalism, the highest court of each state functions as the final arbiter on questions of

82. NAACP v. Button, 371 U.S. 415, 430 (1963).

83. 347 U.S. 483 (1954).

84. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 38 (1993) (“Because the Court rarely disappoints presidents on issues of immediate interest to them and their followers, it rarely challenges the legislative programs enacted by lawmaking majorities.”).

85. 14 U.S. (1 Wheat.) 304 (1816).

86. See, e.g., Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 977 (1985).

87. See *id.*

that state's laws.⁸⁸ Hence the Supreme Court will not review a state court judgment that rests on an adequate and independent state-law ground, even if the state court also has ruled on federal issues. And since a state may afford its citizens broader rights than those found in the Federal Constitution, a state court judgment interpreting the state's constitution as such is generally immune from Supreme Court revision.⁸⁹

The doctrine of adequate and independent state grounds thus plays a critical role in affording states independence from the Supreme Court in elaborating norms of equality and social welfare. The Federal Constitution is typically characterized—as the Rehnquist Court notoriously reminded us in *In re DeShaney v. Winnebago County Department of Social Services*⁹⁰—as a “charter of negative rights” that imposes no duty on government to protect its citizens from violence, destitution, or other hazard.⁹¹ Several state constitutions, by contrast, impose affirmative obligations on state government,⁹² recognizing social and economic rights of the type proposed by Franklin D. Roosevelt during the New Deal and incorporated into international human rights treaties and modern constitutions around the world.⁹³ As the federal judiciary became a less reliable guardian of individual rights beginning in the 1970s, lawyers turned their focus to state courts and state law, and there ensued a renaissance of sorts in the elaboration of state constitutional rights,⁹⁴ many involving housing, school finance, and public

88. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983) (explaining extent to which the Supreme Court could review the state court's decisions). But see *Bush v. Gore*, 531 U.S. 98, 130 (2000) (reviewing state law question that was antecedent to federal law claim).

89. See, e.g., *Pollock*, *supra* note 86, at 985.

90. 489 U.S. 189 (1983).

91. See Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 811 (2002) (noting absence of positive rights from the Federal Constitution and discussing state constitutions as alternative source of such rights). By 1970, the Court had articulated its position that no right to subsistence inheres in the Federal Constitution. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

92. See HELEN HERSHKOFF & STEPHEN LOFFREDO, *THE RIGHTS OF THE POOR: THE AUTHORITATIVE ACLU GUIDE TO POOR PEOPLE'S RIGHTS* 3-4 (1997) (summarizing state constitutional provisions involving the poor).

93. See Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 526-39 (1992) (contrasting approach to social and economic rights in the U.S. Constitution with approaches in other modern democratic constitutions and international covenants).

94. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490-91 (1977) (encouraging renewed attention to state constitutional provisions as an alternative source of individual rights).

assistance, all with special consideration of the rights of the poor.⁹⁵ One can fruitfully draw on these state law cases⁹⁶ to illustrate the operation of the adequate and independent state grounds doctrine while also exploring federalism as a source of progressive empowerment for states and individuals in the area of social welfare and positive rights.

D. The Eleventh Amendment and Remedial Protection for Welfare Rights

State sovereign immunity, once confined to the study of federal jurisdiction, now appears with increasing frequency in the constitutional law course.⁹⁷ This development follows suit with the Rehnquist Court's dramatic expansion of that immunity⁹⁸ and simultaneous restriction of Congress' authority to abrogate it under Section 5 of the Fourteenth Amendment.⁹⁹ It would be difficult to overestimate the importance of the doctrine to the actual practice of poverty law. In addition, at least one of the foundational cases—*Edelman v. Jordan*¹⁰⁰—offers opportunities to bring poverty-law issues into the class.

Plaintiffs in *Edelman* were poor, elderly, and disabled people whose benefits under the federal-state Aid to Aged, Blind and Disabled ("AABD") program had been withheld by the Illinois Department of Public Aid in violation of federal law.¹⁰¹ The lower courts ordered Illinois officials to restore the illegally withheld federal benefits, but the Supreme Court ruled that such relief amounted to "an award of damages against the State" and was therefore barred by the Eleventh Amendment.¹⁰² The case effectively overruled a half dozen recent welfare decisions by the Court

95. Helen Hershkoff, *Positive Rights and State Constitutions*, 112 HARV. L. REV. 1131, 1135-38 (1999).

96. For a recent example, see *In re Aliessa v. Novello*, 96 N.Y.2d 418, 435-36 (2001) (holding on state and federal constitutional grounds that New York must extend state-financed Medicaid coverage to certain immigrants excluded from the federal Medicaid program by federal "welfare reform" legislation).

97. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 222-58 (Erwin Chemerinsky et al. eds., 2d ed. 2005); WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 256-69 (Robert C. Clark et al. eds., 12th ed. 2005); STONE ET AL., *supra* note 74, at 310-12.

98. See, e.g., *Fed. Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 769 (2002); *Alden v. Maine*, 527 U.S. 706, 759-60 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996).

99. See, e.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356, 371 (2001).

100. 415 U.S. 651 (1974).

101. *Id.* at 653-57.

102. *Id.* at 668-69.

which had upheld the retroactive award of public assistance. Doctrinally, *Edelman* refined the contours of the prospective relief/retrospective relief dichotomy applicable to *Ex parte Young* suits,¹⁰³ and established that the federal courts would find state “waiver” of Eleventh Amendment immunity “only where stated ‘by the most express language or by such overwhelming implications.’”¹⁰⁴ Both branches of the ruling are worth discussion.

First, the Court’s characterization of plaintiffs’ claims for relief provides an illustration of how the construction and application of formal legal categories often ignore the material realities confronting people living in poverty. The line drawn by the Court for *Ex parte Young* suits distinguishes “retrospective relief”—said to serve compensatory and deterrence interests insufficient to overcome the Eleventh Amendment—from “prospective” relief requiring “state officials to conform their conduct to the requirements of federal law”—permitted as necessary to vindicate federal supremacy interests.¹⁰⁵ In *Edelman*, the Court reflexively equated benefit restoration with a prohibited “retrospective” damage award. In the context of a suit for illegally withheld subsistence payments, though, the restoration remedy might more aptly be viewed as relief from a continuing subversion of federal anti-poverty policy rather than as mere compensation for past harm. The Court’s contrary conclusion is strangely at odds with its own insight in *Goldberg v. Kelly*¹⁰⁶—that the circumstances of a destitute person denied relief become immediately desperate¹⁰⁷—since it is hard to imagine how the mere passage of time would erase the economic echoes of such profound deprivation.¹⁰⁸ When I have

103. 209 U.S. 123 (1908). The doctrine of *Ex parte Young* permits private suits against state officials in federal court for prospective relief on a federal law claim, even though the Eleventh Amendment and allied state sovereign immunity principles ordinarily bar such suits against states and state agencies.

104. *Edelman*, 415 U.S. at 673.

105. *Green v. Mansour*, 474 U.S. 64, 68-69 (1985).

106. 397 U.S. 254 (1970).

107. *Id.* at 264 (“[T]he crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.”).

108. Ironically, the *Edelman* Court acknowledged in passing that the State’s failure to restore illegally withheld disability payments might defeat an ongoing federal policy of relieving the needs of the poor, but dismissed that insight with an uninformed assumption that as time passes, an award of retrospective relief would serve only a compensatory function. See *Edelman*, 415 U.S. at 666 (“The second federal policy which might arguably be furthered by retroactive payments is the fundamental goal of congressional welfare legislation—the satisfaction of the ascertained needs of improv-

asked students how they suppose the *Edelman* plaintiffs survived without subsistence payments and whether they might still feel the impact of the unlawful denial of benefits months later, they have no problem imagining that the loans owed, unpaid debts, and rent and utility arrears accrued have likely followed these individuals with crushing effect and continued to undermine the central federal policy of relieving their destitution; and that this might well count as “present effects” of the Illinois agency’s violation of plaintiffs’ federal rights. The Court’s failure or refusal to appreciate such realities in *Edelman* stands as one example of a judicial worldview unable to grasp the hardships faced by people in poverty or unwilling to value them in the creation and application of doctrine.

The second major issue *Edelman* addressed was whether the state had waived its immunity to suit by voluntarily enlisting in the federal AABD program and accepting federal funds on condition that it administer the program in accordance with federal law.¹⁰⁹ The Court rejected this suggestion of constructive waiver.¹¹⁰ For the majority, it was not enough that Illinois had accepted millions of dollars of federal AABD funds on agreement to administer the program in accordance with federal laws, and that the Supreme Court by this time had held that the intended beneficiaries of these federal programs had a right to sue state officials in federal court to enforce such laws.¹¹¹ One might juxtapose the *Edelman* Court’s protective stance against waiver of state immunity with *Wyman v. James*¹¹²—the infamous “home visit” case—where the Court effec-

erished persons. Federal standards are designed to ensure that those needs are equitably met; and there may perhaps be cases in which the prompt payment of funds wrongfully withheld will serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.”) (quoting *Rothstein v. Wyman*, 467 F.2d 226, 235 (2d Cir. 1972)).

109. *Edelman* also provides an occasion to explain the structure of categorical grant-in-aid programs established by the Social Security Act, often described by the Supreme Court as “a scheme of cooperative federalism.” 415 U.S. at 689. Though Congress eventually replaced AABD with the federal Supplemental Security Income Program, other important programs, including Medicaid and AFDC, shared the same structure of joint federal-state funding with state administration in accordance with federal law. Even the Temporary Assistance to Needy Families block grant—which replaced the Aid to Families with Dependent Children Program—retains some of the structural features of the grant-in-aid programs, despite the devolutionary rhetoric that accompanied its adoption with federal welfare reform legislation in 1996. See 42 U.S.C. §§ 601-604 (2000).

110. *Edelman*, 415 U.S. at 673-77.

111. *Id.* at 688-95 (Marshall, J., dissenting).

112. 400 U.S. 309 (1971).

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tively held that welfare recipients' acceptance of subsistence payments waived their right to be secure in their homes against warrantless searches.¹¹³

E. Federal Legislative Power: Underenforcement, Rationality Review, and the Poor

Another topic looks at social welfare rights and equal protection through the lens of Congress' Section 5 power and the theory of "underenforced" constitutional norms. According to this theory, developed by Lawrence Sager, the federal judiciary commonly declines to enforce constitutional norms to their full extent for reasons of relative institutional competence or deference to political branches.¹¹⁴ When this occurs, the theory holds, the resulting judicial decision ought not to be regarded as a definitive "statement about the meaning of the constitutional norm in question."¹¹⁵ Rather, the full measure of the constitutional norm—beyond the portion the courts feel capable of enforcing—should be regarded as binding other governmental officials. Applied to poor people, Sager and others argue, while the Constitution may be "thin" with respect to *judicially-enforceable* welfare rights, it nevertheless imposes obligations on Congress and the states to take steps to assist the poor.¹¹⁶

The theory of underenforced constitutional norms, while never expressly embraced by the Court, appears in Justice Breyer's dissent in *Board of Trustees v. Garrett*¹¹⁷—the high water mark of the Rehnquist Court's rollback of Congress' civil rights power. The

113. *Id.* While the "mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts," *Edelman*, 415 U.S. at 673 (majority opinion), the mere fact that an impoverished family accepted subsistence payments from the State was sufficient to override its privacy rights. The *Wyman* court held that a welfare caseworker's warrantless inspection of a recipient's home did not constitute an unreasonable search under the Fourth Amendment, and that even if it did, the recipient's acceptance of welfare payments effectively waived her right to refuse such inspections. See 400 U.S. at 338 (Marshall, J., dissenting). For a recent extension of *Wyman* to law-enforcement searches of welfare recipients' homes, see *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006), *reh. en banc den.*, 403 F.3d 965 (9th Cir. 2007).

114. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-21 (1978).

115. *Id.* at 1221.

116. See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 411 (1993); see also Tushnet, *supra* note 22, at 1900-02.

117. 531 U.S. 356 (2001).

Court in *Garrett* held that the employment discrimination provisions of the Americans with Disabilities Act exceeded Congress' civil rights authority because those provisions imposed duties on states beyond the "minimally rational" behavior required by the Fourteenth Amendment without a sufficient showing that the statutory remedy bore a "congruence and proportionality" to a demonstrated pattern of constitutional violations.¹¹⁸ In dissent, Justice Breyer explained that the Court's earlier determination in *Cleburne v. Cleburne Living Center, Inc.*,¹¹⁹ to apply "mere rational-basis review to disability discrimination claims" did not reflect a judgment about the outer limit of protection afforded by the Fourteenth Amendment to people with disabilities, but rather rested on institutional and separation of powers considerations.¹²⁰

In like manner, one might consider whether the Court's relegation of poor people's constitutional claims to a weak form of rationality review rests on institutional and separation of powers concerns and represents another example of an underenforced constitutional norm. Analytically, the argument that the Fourteenth Amendment requires some tangible protection for the poor—undeniably a "politically powerless" out-group—seems substantial.¹²¹ The near absolute deference the federal judiciary affords social-welfare legislation proceeds on the theory that "[under] our structure of government' courts ought to defer to the democratic decisionmaking, especially on ordinary distributional matters."¹²² Justified this way, the Court's poverty cases rest on the improbable premise that poor people have fair access to the political process, a premise at odds with the Court's own insight that economic inequality tends to reproduce itself in the political sphere, displacing legitimate democratic processes and marginalizing those without the resources to play.¹²³ Nevertheless, the Court has never addressed the argument that the political incapacity of poor people might warrant judicial attention, even though the

118. *Id.* at 376 (Breyer, J., dissenting).

119. 473 U.S. 432 (1985).

120. *Garrett*, 531 U.S. at 383-84 (Breyer, J., dissenting).

121. See Loffredo, *Poverty, Democracy and Constitutional Law*, *supra* note 46, at 1331-40, which develops this analysis in detail.

122. *Id.* at 1278.

123. See *id.* at 1284-85 (discussing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

marginalization of that out-group implicates concerns at the heart of the *Carolene Products* paradigm.¹²⁴

F. The Dormant Commerce Clause and National Community

That the Commerce Clause has anything to say about treatment of poor people may come as a surprise to students. Yet throughout our history that clause has served as the constitutional tool to advance values “no less weighty than national union, community and democratic governance, all of which have the capacity to secure and advance human liberty.”¹²⁵ Indeed a key, though largely neglected, dormant commerce clause case—*Edwards v. California*¹²⁶—speaks eloquently to the issues of poverty, inclusion, and national community, and provides a window into the shifting judicial understandings of poor people and the nation’s responsibility for the economic well-being of its citizens.

Edwards arose from the catastrophic events of the Great Depression, when drought and economic collapse uprooted millions of families and set waves of economic refugees on the road in search of a way to survive. In response, California took a variety of measures to exclude destitute migrants from its territory, including the enforcement of a statute that made it a crime to transport an “indigent person” into the jurisdiction.¹²⁷ The Supreme Court invalidated the statute, holding that the Commerce Clause prohibited “attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.”¹²⁸ Quoting Justice Cardozo, the Court described the “political philosophy” and theory underlying the Commerce Clause as one under which “the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”¹²⁹

124. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938); see LOUIS LUSKY, *BY WHAT RIGHT?* 108-14, 312-14 (1975) (describing the theory of the *Carolene Products* case and its influence on modern constitutional doctrine).

125. Stephen Loffredo, “*If You Ain’t Got the Do, Re, Mi*”: *The Commerce Clause and State Residence Restrictions on Welfare*, 11 *YALE L. & POL’Y REV.* 147, 153 (1993) [hereinafter Loffredo, “*If You Ain’t Got the Do, Re, Mi*”].

126. 314 U.S. 160 (1941).

127. *Id.* at 166.

128. *Id.* at 173. Poverty and the task of relieving it, the Court thought, plainly qualified as matters of national scope common to all the states. *Id.* at 173-77.

129. *Id.* at 174 (quoting *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935)). The Court also regarded the California statute as objectionable on a democratic theory of constitutional review. *Id.* (“Moreover, the indigent non-residents who are the real victims

Edwards is worth studying for a number of reasons. First, it reveals the Court's conception of poverty, poor people, and national responsibility at a critical moment in the Nation's history. In defense of its statute, California offered an account of poor people drawn from a set of stunningly negative stereotypes and argued that the migration of such persons into the state threatened public morality.¹³⁰ On this occasion, at least, the Court would have none of it. Repudiating its own long-held notion that "a person . . . without employment and without funds . . . constitutes a 'moral pestilence,'" the Court proclaimed that "[p]overty and immorality are not synonymous."¹³¹ On the question of governmental responsibility, the Court embraced the reconceived understandings of national power at the heart of the New Deal and the emergence of the welfare state, announcing that in an "industrialized society," issues of poverty and economic security had become matters of national dimension and concern.¹³² "[T]he theory of the Elizabethan poor laws," the Court declared, "no longer fit the facts."¹³³ One might discuss with students why the Court chose to re-evaluate poverty and governmental responsibility at this historical juncture and how the conceptions it articulated compare with those that appear in later eras.¹³⁴

of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy.").

130. California's initial brief to the Court described the poor in these terms:

Underfed for many generations, they bring with them the various nutritional diseases of the South. Their presence here upon public relief, with their habitual unbalanced diet and consequent lowered body resistance, means a constant threat of epidemics. Venereal diseases and tuberculosis are common with them, and are on the increase. The increase of rape and incest are [sic] readily traceable to the crowded conditions in which these people are forced to live. Petty crime among them has featured the criminal calendars of every community into which they have moved.

Id. at 167-68.

131. *Id.* at 177.

132. *Id.* at 174-77 (stating that "the relief of the needy has become the common responsibility and concern of the whole nation").

133. *Id.* at 174.

134. *Compare, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 264-66 (1970) (noting that forces beyond the control of the poor account for the persistence of poverty), *and* *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969) (de-stigmatizing public assistance receipt, noting the absence of any reason "why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers . . . the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities"), *with* *Dandridge v. Williams*, 397 U.S. 471, 472 (1971) (validating negative stereotypes of welfare recipients); *cf.* Lucy A. Williams, Essay, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*,

The *Edwards* case also serves as a useful reminder of the ways in which the nation has attempted to exclude the poor from the bonds of shared community, concern, and citizenship.¹³⁵ It is a reminder that bears more than historical significance. In the 1990s, many states returned to exclusionary strategies reminiscent of those in *Edwards*, imposing durational residence restrictions on welfare for the express purpose of preventing the in-migration of needy families.¹³⁶ Having studied *Edwards*, students quickly conclude that the states' avowed purpose is constitutionally impermissible under the Commerce Clause. Congress' subsequent authorization of such discrimination, through the 1996 federal welfare reform legislation,¹³⁷ poses the question of whether poor people are at another moment of special vulnerability and ostracism and if so, what meaning that holds for the constitutional values of national unity and equal citizenship.¹³⁸

Finally, it is worth discussing the debate in *Edwards* over the use of the Commerce Clause as a tool for the protection of human rights. Justice Douglas expressed special misgivings, stating that "the right of persons to move freely from State to State [should] occup[y] a more protected position in our constitutional system than does the movement of cattle, fruit, steel, and coal across state lines."¹³⁹ Justice Jackson articulated similar concerns,¹⁴⁰ and added that "[a]ny measure which would divide our citizenry on the basis of property into one class free to move from state to state and an-

102 YALE L.J. 719, 724-25 n.39 (1992) (discussing the stereotyped assumptions about poor women underlying behavior modification restrictions on welfare eligibility such as the family cap provision upheld by *Dandridge*).

135. Studying *Edwards* can counteract the vanishing awareness of this chapter in our history. Many students, especially those unversed in the history or writing of the depression era, see, e.g., JOHN STEINBECK, *THE GRAPES OF WRATH* (1939), express incredulity at the treatment of the poor revealed in the case.

136. See Loffredo, "If You Ain't Got the Do, Re, Mi", *supra* note 125, at 148-49, 163-73.

137. 42 U.S.C. § 604(c) (2000) (authorizing states to deny certain assistance to needy families with less than twelve months' residence in the state). Though Congress may authorize state regulations that would otherwise violate the dormant commerce clause, see *Prudential Ins. v. Benjamin*, 328 U.S. 408, 425 (1946), the Supreme Court invalidated these state welfare laws as violating the Fourteenth Amendment. *Saenz v. Roe*, 526 U.S. 489, 511 (1999).

138. These ideas are developed in Loffredo, "If You Ain't Got the Do, Re, Mi", *supra* note 125, at 154.

139. *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring).

140. *Id.* at 182 (Jackson, J., concurring) ("[T]he migrations of a human being . . . do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the Commerce Clause is likely to result eventually in either distorting the commercial law or in denaturing human rights.").

other class that is poverty-bound to the place where it has suffered misfortune” is inconsistent with the concept of “national citizenship” that in essence defines the national community.¹⁴¹ One might relate this debate to the discomfort expressed a generation later when the Supreme Court relied on the Commerce Clause—not the Fourteenth Amendment—to sustain major provisions of the Civil Rights Act of 1964.¹⁴² The misgivings are easy to understand, and one might have wished for more ample interpretations of the Fourteenth Amendment. But it would be a mistake to ignore the potential of the structural alternative presented by the Court’s reliance on the Commerce Clause. There may be value in anchoring protections for the poor in structural theories of national community, much in the way that *Goldberg*¹⁴³ appealed to the governmental interest in securing material well-being of all citizens as a means of constituting the community contemplated by the Constitution.¹⁴⁴

IV. CONCLUSION

Constitutional law, perhaps more than any other branch of legal study, speaks directly to the issue of inclusion and identity; it reflects who we are as a nation and as a people, who belongs to our community, and what we owe each other as equal citizens.¹⁴⁵ Divisions of class, like those of race and gender, mark fault lines that tear at the fabric of our constitutional system. That issues of poverty, economic inequality, and class play so invisible a role in the conventional constitutional law course underscores the limited claims that poor people can make on public power to improve their condition. Yet as Charles Reich said a generation ago, “[p]overty is primarily a legal problem, since in a country of great wealth it is a problem of distribution, not a problem of producing more goods.”¹⁴⁶ Few could disagree that the legal system sits at the vortex of the political and economic structures that foreseeably per-

141. *Id.* at 185.

142. *See, e.g.,* *Heart of Atl. Motel v. United States*, 379 U.S. 241, 279 (1964) (Douglas, J., concurring).

143. 397 U.S. 254, 265 (1970).

144. For further development of these ideas, see Loffredo, “*If You Ain’t Got the Do, Re, Mi*”, *supra* note 125, at 199-202.

145. *See generally* KARST, *supra* note 35.

146. Reich, *supra* note 15, at 1407.

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petuate unconscionable levels of poverty in the United States,¹⁴⁷ the wealthiest society human history has known. Constitutional law may not afford the full measure of relief needed to end poverty and its associated indignities.¹⁴⁸ But our students should at least be informed of the role that law plays in perpetuating social isolation, economic abasement, and political marginalization and be educated in ways to imagine law's improvement.

147. Nor could one reasonably deny that the legal profession itself bears considerable responsibility for maintaining this state of affairs. *See, e.g.*, DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

148. *See generally* Charles L. Black, Jr., *Some Notes on Law Schools in the Present Day*, 79 *YALE L.J.* 505, 506-07 (1970) (urging deployment of the law to attack the ills of economic inequality and poverty, but doubting whether law is capable of providing the identity and community that American society has largely withheld from its neediest members).

